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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1673

OSCAR E. COX,
Plaintiff-Appellant,

vs

CHESAPEAKE OHIO RAILROAD COMPANY,
a corporation,
Defendant-Appellee,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

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OSCAR E. COX,
Plaintiff-Appellant,

vs

CHESAPEAKE OHIO RAILROAD COMPANY,
a corporation,
Defendant-Appellee,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Oscar E. Cox, the petitioner herein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on March 14, 1974.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Sixth Circuit is unreported and is printed in Appendix A hereto, *infra,* page 3a. The Judgment of the Circuit Court of Appeals is printed in Appendix A hereto, *infra,* page 3a. The Journal Entry of Judgment of the United States Court for the Eastern District of Michigan, Southern Division, is printed in Appendix A hereto, *infra,* page 1a.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on March 14, 1974, *infra,* Appendix A, page 3a.

QUESTIONS PRESENTED

Whether plaintiff-appellant, a United States citizen, may maintain an action under the Federal Employers' Liability Act, 45 U.S.C., Section 51 against defendant-appellee, an American railroad company, for injuries sustained in defendant-appellee's Canadian operation.

STATUTE INVOLVED

Federal Employers' Liability Act, 45 U.S.C., Section 51:

"Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence—

Definition of employees.—

Every common carrier by railroad while engaging in commerce between any of the several State or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes

of this Act [§§51-60 of this title], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act [§§51-60 of this title] and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908) [§§51-60 of this titled "An Act relating to the liability of common title], as the same has been or may hereafter be amended. (Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.)."

STATEMENT

Plaintiff-Appellant was a resident of the City of Detroit, County of Wayne, State of Michigan and was continuously employed by defendant-appellee and while so employed performed all his duties in and around defendant-appellee's Detroit, Michigan yard.

That paintiff-appellant while engaged in optional form of employment was caused to be transported to the City of Duton, Providence of Ontario, Country of Canada in order to perform services for a specific purpose and limited period of time. That while plaintiff-appellant was performing his optional employment under the direct supervision and control of defendant-appellee's officers and/or agents who were normally located and employed in the City of Detroit, County of Wayne, State of Michigan and was performing said services with equipment furnished, permanently located and serviced by defendant-appellee from its facilities located in the City of Detroit, County of Wayne, State of Michigan. Plaintiff-appellant sustained

serious personal injuries as a direct result of defendant-appellee's failure to provide proper equipment.

The basis for Federal Jurisdiction in the Court of the first instance is based upon diversity of citizenship, plaintiff-appellant being a resident of Detroit, Michigan and defendant-appellee being an American railroad company incorporated under the laws of the State of Virginia and the amount of controversy exceeding Ten Thousand and 00/100 ($10,000.00) Dollars.

REASONS FOR GRANTING THIS WRIT

That Summary Judgment was granted in the District Court of the United States for the Eastern District of Michigan, Southern Division and affirmed by the United States Court of Appeals, based upon the authority of *New York Central Railroad Company v Chisholm,* 268 U.S. 29, 1925.

That the basis of authority rest upon an interpretation of the Conflicts-of-Law principle, *Lex Loci Delicti,* place of the wrong, which due to the necessity of modern society, has become antiquated and is being replaced, in most other areas of law, with the tests of "significant contracts", "significant relationships", "grouping of contacts", or "governmental interests".

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

KEIDAN & KEIDAN
By: /s/ BRUCE H. KEIDAN
Attorneys for Petitioner
26400 Lahser Road
Southfield, Mi 48076
355-1400

BRUCE H. KEIDAN
Counsel of Record
26400 Lahser Road
Southfield, Mi 48076
355-1400

Dated:———————

APPENDIX A

DOCKET ENTRIES

Title of Case:

Oscar E. Cox,
Plaintiff,
vs.
Chesapeake Ohio Railroad Company,
a Corporation,
Defendant.

38044

Attorneys:

For Plaintiff: Keidan & Keidan, 26400 Lahser Road, Southfield, Michigan 48076
For Defendant: Straub & Nelson, 407 1 Northland Plaza, 20755 Greenfield Rd., Southfield, Mi.

Basis of Action: Trespass. Personal Injury.

	Plaintiff's Account	*Received*	*Disbursed*
1972			
Mar. 22	Filing fee	15.00	
Mar. 23	O. D. 174		15.00
1973			
Feb. 23	Appeal filed	5.00	
Feb. 26	O. D. 146		5.00

1972

Mar. 22. Complaint filed—summons issued.
Mar. 27. Marshal's return, filed.
Mar. 29. Deft's motion for summary judgment with affidavit, brief and proof of service, filed. Hearing April 17/72.

Apr. 17. Motion for summary judgment adj. to May 8/72. Gubow, J.
May 2. Answer to deft's motion for summary judgment.
May 8. Motion for summary judgment heard and taken under advisement.
May 22. Motion for summary judgment decision adj. to June 9/72. Gubow, J.
June 9. Hearing on motion for summary judgment resumed—motion denied. Gubow, J.
June 26. Order denying deft's motion for summary judgment filed and entered. Gubow, J.
July 13. Answer filed.
July 19. Answer to affirmative defense filed.
Aug. 1. Notice of depositions filed.
Aug. 3. Notice of pre-trial for Sept. 28/72, filed.
Sept. 28. Pre-trial had. Gubow, J.

1973

Jan. 2. Ptf's interrogatories to deft. filed.
Jan. 10. Notice of hearing on motion for summary judgment with brief, for Jan. 22/73, filed.
Jan. 19. Discovery deposition of Lewis Horn, Sr., filed.
Jan. 19. Discovery deposition of Alawi Salem Said, filed.
Jan. 19. Discovery deposition of Wallace F. Donahue, filed.
Jan. 19. Discovery deposition of Gilbert Wiseman, filed.
Jan. 22. Motion for summary judgment heard and taken under advisement. Gubow, J.
Jan. 22. Ptf's answer to motion for summary judgment, filed.
Jan. 29. Motion for summary judgment heard and denied. Gubow, J.
Jan. 31. Judgment in favor of deft. and against ptf. of no cause of action and dismissal of case with prejudice to ptf., filed and entered. Gubow, J.

Feb. 2. Transcript of an excerpt of proceedings on Jan. 29/73, filed.
Feb. 23. Notice of appeal, filed.
Feb. 23. Letter to atty re-appeal, filed.
Feb. 23. Proof of mailing, filed.
Mar. 23. Letter transmitting file to C.C.A., filed.

No. 73-1304

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Oscar E. Cox,
Plaintiff-Appellant,
vs.
Chesapeake Ohio Railroad Company,
a Corporation,
Defendant-Appellee.

APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 14, 1974.

Before: Celebrezze and Peck, Circuit Judges, and McAllister, Senior Circuit Judge.

Per Curiam. This is an appeal from a summary judgment entered in favor of defendant. Plaintiff sued his railroad employer under the Federal Employers' Liability Act, 45 U.S.C. § 51, (hereinafter "F.E.L.A.") for injuries sustained while performing voluntary overtime work as a wrecker in defendant's Canadian operations. Normally, plaintiff worked in and around Detroit and did not, except on this one occasion, cross to Canada.

Defendant filed a motion to dismiss on the grounds that F.E.L.A. does not apply to railroad employees injured outside the territorial United States. After receiving briefs and hearing oral argument on this issue the District Court granted defendant's motion to dismiss. Defendant-appellee defends this decision on the authority of *New York Central R.R. Co* v. *Chisholm*, 268 U.S. 29 (1925). In *Chisholm*, a case strikingly similar on its facts to the one at bar, the Supreme Court, after noting that the "case presents nothing beyond a question of construction," held that F.E.L.A. does not have extra territorial effect. 268 U.S. at 31.

Plaintiff-appellant argues that *Chisholm* does not stand for the proposition that Congress did not intend F.E.L.A. application for railroad employees injured while temporarily working outside the United States, but rather that the decision reflected contemporary conflicts of law principles that stressed *lex loci delictus* theories. Appellant further asserts that conflicts of law principles have undergone profound changes since 1925, and that under currently accepted theories, variously known as "significant contacts," "significant relations" or "governmental interests" tests, United States law (in this case F.E.L.A.) would be applied.

While it is true, as appellant asserts, that a number of federal[1] and state[2] courts have begun to reject the *lex loci*

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[1] *Richards* v. *United States*, 369 U.S. 1 (1962); *Romero* v. *Int'l Term Co.*, 358 U.S. 354 (1959); *Lauritzen* v. *Larsen*, 345 U.S. 571 (1952) (Jones Act); *McClure* v. *United States Lines Co.*, 368 F.2d 197 (4th Cir. 1966); *Tranmontana* v. *S. A. Empresa De Viaco Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965).

[2] *Reich* v. *Purcell*, 63 Cal. Rptr. 31, 432 P.2d 727 (1967); *Wilcox* v. *Wilcox*, 26 Wis.2d 617, 133 N.W.2d 408 (1965); *Babcock* v. *Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279 (1963).

delictus test method of determining applicable law, *Chisholm* remains a firm restriction on the extra territorial application of F.E.L.A.. Indeed, the Supreme Court apparently added to this resolve in *Lauritzen* v. *Larsen*, 345 U.S. 571, 581 (1952), wherein it stated that "[w]e have held [F.E.L.A.] not applicable to an American citizen's injury sustained in Canada while in service of an American employer." Appellant has failed to demonstrate any reasonable basis for our holding that the Supreme Court has abandoned the *Chisholm* decision, however desirable such a course may be.

The District Court correctly determined that it lacked jurisdiction over this case.

The judgment of the District Court is affirmed.

JUDGMENT FOR DEFENDANT

United States of America

In the District Court of the United States
For the Eastern District of Michigan
Southern Division

(Filed January 31, 1973)

Oscar E. Cox, Plaintiff, vs. Chesapeake Ohio Railroad Company, a Corporation, Defendant.	Civil Action No. 38044

At a session of said Court held in the Federal Building, Detroit, Michigan, on the 31st day of January, 1973.

Present: The Honorable Lawrence Gubow, District Judge.

This matter having come on for hearing on defendant's Motion for Summary Judgment and the matter having been fully briefed by the parties hereto and the Court having heard argument of counsel, and being fully apprised in the matter,

It Is Hereby Adjudged And Ordered that judgment in favor of defendant and against plaintiff of no cause of action may be and the same is hereby entered, the case being dismissed with prejudice to plaintiff.

/s/ Lawrence Gubow,
District Judge.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1673

OSCAR E. COX,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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WO. 3-8700—WO. 3-8701

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1673

OSCAR E. COX,
Petitioner,

v.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Judgment of the United States District Court for the Eastern District of Michigan, Southern Division, is printed as Appendix A in Petitioner's Petition, page 6a. The Opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed as Appendix A in Petitioner's Petition, page 3a.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 14, 1974, and is printed as Appendix A in Petitioner's Petition, page 3a. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Whether Petitioner, a United States citizen employed by Respondent, may maintain an action under the Federal Employers' Liability Act, 45 U.S.C. §51, against Respondent, an American railroad company, for injuries sustained in Canada in the course of his employment.

STATUTE INVOLVED

The Federal Employers' Liability Act, 45 U.S.C. §51, is set forth in Petitioner's Petition, page 3.

STATEMENT

Petitioner, a citizen of the United States and employed by Respondent, a common carrier by railroad engaged in interstate and foreign commerce, was injured in the course of his employment at or near the City of Dutton, Province of Ontario, Dominion of Canada. As a result of the injuries sustained, Petitioner availed himself of the laws of Canada and was awarded medical compensation payments and a

permanent-partial disability award under the provisions of the Workmen's Compensation Act of Ontario Canada, Appendix A, *infra,* page 1a. Subsequently Petitioner filed suit in the United States District Court for the Eastern District of Michigan, Southern Division, claiming damages under the provisions of the Federal Employers' Liability Act. On Motion for Summary Judgment the District Court entered judgment in favor of Respondent on the grounds that the law of Canada governed the rights of Petitioner for the injuries suffered. From that judgment Petitioner appealed to the United States Court of Appeals for the Sixth Circuit which affirmed the judgment by Opinion dated March 14, 1974, which Opinion is set forth by Petitioner at page 3a of his Appendix.

ARGUMENT

The issue in the present case is uniquely narrow, it being whether an employee of an American railroad injured in Canada in the course of his employment may invoke the provisions of the Federal Employers' Liability Act, so-called, 45 U.S.C. §51, as a remedy against his employer or whether his remedy lies solely under the law of Canada.

I.

THE DECISION BELOW IS CLEARLY CORRECT

The sole issue in this case was decided adversely to Petitioner by the unanimous opinion of this Court in *New York Central Railroad Company* v. *Chisholm, Adm.,* 268 U.S. 29, under an almost identical factual situation. In *New York Central* v. *Chisholm, Adm., supra,* an American citizen, employed by an American railroad, was fatally injured in Canada in the course of his employment. In that case

this Court held that the provisions of the Federal Employers' Liability Act do not have extra territorial effect and that the law of Canada provided the sole remedy for Petitioner. The doctrine set forth in *New York* v. *Chisholm, Adm., supra,* was cited with approval by this Court in *Lauritzen* v. *Larson,* 345 U.S. 571, when this Court stated, at p. 581:

> "It did so by reference to the Federal Employers' Liability Act, which we have held not applicable to an American citizen's injury sustained in Canada while in service of an American Employer. *New York Central R. Co.* v. *Chisholm, Adm.,* 268 U.S. 29."

The Court below therefore did not decide an important question of Federal law which had not been settled by this Court. On the contrary, the decision below followed precisely the decision of this Court in *New York Central* v. *Chisholm, Adm., supra,* under a strikingly similar factual situation.

II.

THERE IS NO CONFLICT OF DECISIONS

Petitioner cites no authority and makes no assertions that the decision of the Court below is in conflict with the decision of any other court of appeals or the applicable decisions of this Court. He is merely dissatisfied with the ruling below.

Respondent asserts that the ruling below is not only in conformity with the decision of this Court in *New York Central* v. *Chisholm, Adm., supra,* but is also compatible with the later decisions of this Court in *Nagueira* v. *New York, New Haven & Hartford Railroad Company,* 281 U.S. 128, and *Pennsylvania Railroad Co.* v. *O'Rourke,* 344 U.S. 334. In both of those cases Petitioners were railroad em-

ployees injured in the course of their employment, the injuries occurring on navigable waters rather than on land. In both cases Petitioners sought recovery against their employers under the provisions of the Federal Employers' Liability Act. In both cases this Court held that the Federal Employers' Liability Act did not provide a remedy for Petitioners but their remedy was afforded solely by the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* The decisions of this Court in *Nagueira* v. *New York, New Haven, etc., supra,* and *Pennsylvania Railroad Co.* v. *O'Rourke, supra,* are consistent with this Court's decision in *New York Central Railroad Company* v. *Chisholm, Adm., supra,* in that in each case this Court held that the law of the place where the accident occurred governed the remedies of Petitioners. The ruling of the Court below in the instant case is squarely within those principles. To hold otherwise would be to afford Petitioner in the instant case a choice of remedies not available to railroad workers elsewhere.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. STRAUB
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444-5250

Dated: May 21, 1974

APPENDIX A

IN THE

District Court of the United States

For the Eastern District of Michigan
Southern Division

Oscar E. Cox, Plaintiff, vs. Chesapeake Ohio Railroad Company, a Corporation, Defendant.	Civil Action No. 38044

AFFIDAVIT

State of Michigan,
County of Oakland—ss.

M. D. Brickman, being first duly sworn, deposes and says that he is familiar with the facts of this case and is duly authorized by defendant to make this Affidavit in connection therewith, and says:

1. The accident giving rise to the instant litigation occurred at or near Dutton, Ontario, Canada, on or about August 13, 1970 when plaintiff, an employee of defendant, was injured while in the course of his employment with defendant.

2. That as a result of the accident and injuries sustained plaintiff has received benefits under the Workmen's Compensation Act of the Province of Ontario, both as to payments for medical expenses and for disability benefits.

Further deponent saith not.

/s/ M. D. Brickman

Subscribed and sworn to before me this 27th day of March, 1972.

/s/ Marilyn J. Karakas
Notary Public, Wayne County, Michigan.
Acting in Oakland County.
My commission expires March 22, 1975.